
**In the District Court of the United States
for the Eastern District of Pennsylvania.**

OCTOBER TERM, 1914.

UNITED STATES OF AMERICA

v.

MOTION PICTURE PATENTS COMPANY AND OTHERS.

REPLY BRIEF FOR THE UNITED STATES.

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REPLY BRIEF FOR THE UNITED STATES.

I.

The license restrictions and conditions must be considered as a whole, not independently of each other.

In their consideration of the questions of patent law involved in this case defendants' counsel make a fundamental error in their recital of the facts. They take each restriction and condition contained in the several license agreements and examine it as if it were an isolated, single restriction attached to the use of a patented article by the owner of a single patent. They entirely overlook the fact that such is not the case in respect to one of the restrictions contained in the license agreements. Each restriction is but a part of the

whole. In the absence of the complete arrangement not one of the restrictions would have existed. The formation of the Patents Company, the transfer to it of the various patents on December 18, 1908, the ten license agreements entered into by the Patents Company with the ten manufacturers, the rental exchange agreements entered into by the Patents Company with the exchanges, the projecting machine license agreement entered into by the Patents Company with the projecting machine manufacturers, the so-called licenses issued by the Patents Company to the exhibitors, the so-called royalties imposed on exhibitors, the conditions in all the agreements, were all parts of the plan, each part being inseparably connected with every other part. The court cannot consider the question of the legality of a single restriction contained in one of the agreements above enumerated without considering all the restrictions incorporated in that agreement. Furthermore, the court must consider not only the license agreement containing the restriction under consideration, but it must have in mind all the other license agreements, containing other restrictions, and also the character of those restrictions.

But defendants' counsel throughout their arguments and briefs treat each restriction as if it were a legal and reasonable condition attached to the use of a patented article by the owner of the patent in the normal and usual development of

the patentee's business. Whereas, as a matter of fact, not one of the conditions was imposed upon the use of any patented article in the normal and usual development of the patentee's business, but each condition took its birth in a combination between the owners of the several patents.

As an instance of the above, we respectfully direct the attention of the court to the examination of the restrictions contained in the brief filed by Mr. Melville Church, beginning page 94 et seq. Throughout Mr. Church's recital of the restrictions and his discussion of the agreements there is not a suggestion or an intimation that these restrictions were entered into by combination of the various owners. His discussion proceeds upon the assumption that one company owning all these patents was imposing the various patent restrictions. He overlooks the manner in which the Patents Company acquired the patents on December 18, 1908. There is no reference to the way in which the Patents Company obtained the patents or to the meetings of the manufacturers.

In two recent cases of the Supreme Court under the antitrust law the court pointed out that acts and contracts which under ordinary circumstances when done by individuals may be lawful become unlawful when done by many. These cases are the *Anthracite Coal* case (reviewed in our main brief, pages 266 et seq.) and the *Pacific & Arctic Navigation Co.* case. (See our main brief, pages

280 et seq.). In the *Anthracite Coal* case, defendants separately and individually had entered into a number of contracts with interstate carriers. Each contract had been entered into by only one of the defendants, and the contracts had been executed at various times. However, owing to the fact that each contract formed part of a concerted plan to secure control of coal and suppress competition, the court condemned each of the contracts. The court said that it was not essential that the contracts considered singly be unlawful as in restraint of trade. Separately considered each of the contracts might have been wholly innocent, but acts absolutely lawful may be steps in a criminal plot. The court condemned the contracts because each contract was part of the scheme or plot.

In *United States v. Pacific & Arctic Navigation Co.* and others, the defendants, who were not competitors of each other, formed a continuous line of transportation by water and rail between certain ports. They established a through route and joint rates with each other, but refused to do so with an independent company operating on part of the through route. If the agreement between defendants in that case had been entered into from natural reasons and from a judgment of the greater efficiency of the defendants' lines as instruments in the transportation than the independent lines, and if the refusal to conclude through routes and joint rates with the independent had been based on

such reasons, there would have been no violation of law. The plan, however, had been entered into for the purpose of injuring the independent company. Therefore, the court said:

The plan makes the parts unlawful, whatever they may be independent of it.

With all respect, we assert that defendants' counsel are not discussing the case at bar and the facts here presented when they take up singly, one after the other, paragraphs of one of the license agreements disconnected from the other paragraphs in the agreement and separated from all the other agreements containing other conditions and when they consider the lawfulness of such paragraph or restriction as if it were a condition imposed in the same way as the condition considered in the *Dick* or *Mimeograph* case was imposed. They overlook the fundamental facts in the case, namely, the circumstances under which the combination had birth and the manner in which the various restrictions were imposed upon the trade and commerce, each restriction being a part in the entire plan and having been devised merely for the purpose of being made a part in the plan.

An act, innocent in itself, may be made a step in a criminal plot. *Aikens v. Wisconsin*, 195 U. S., 194, 205. The plan may make the parts unlawful whatever they may be independently of the plan. *Swift v. U. S.*, 196 U. S., 375, 396; *U. S. v. Pacific & Arctic Ry. Co.*, 228 U. S., 87, 104.

In the *Shoe Machinery* decision the Supreme Court did not have before it for consideration the lawfulness of the numerous interlocking restrictions contained in the licenses issued by the United Shoe Machinery Company. We know of no decision in which interlocking restrictions of the character here present and adopted in the manner disclosed by the evidence have been held lawful by the courts. This significant statement (which however was omitted from the elaborate quotation and discussion of the case in defendants' brief, p. 340) was made by Mr. Justice Holmes in the *Shoe Machinery* case, 227 U. S., 216 (see our main brief, p. 280):

It is to be observed that the conditions now inserted in the leases *are not alleged to have been contemporaneous with the combination* or to have been contemplated when it was made. * * * The validity of the leases or of a combination contemplating them can not be passed upon in this case.

As we have pointed out in our brief, the combination here under consideration contemplated from its very inception the numerous tying and interlocking restrictions which were adopted. These restrictions were the very essence of the combination.

During the argument defendants' counsel conceded that the license agreements were the result of conferences, saying that all important business transactions are the result of conferences. The fact that the license agreements and all the restric-

tions contained in them were arrived at by agreement of all the manufacturers, as alleged in the petition, is strong evidence that the restrictions were not normal and legal conditions affixed to the use of patented articles. In the *Dick* case Mr. Justice Lurton said (224 U. S., at p. 26): "Where, then, is the line between a lawful and an unlawful qualification upon the use?" If a patentee in the ordinary course of business affixes a condition to the use of his patented machine, the fact that he affixes it on his own motion and by independent action is evidence of the fact that he does it in the ordinary course of business. On the other hand, when all the manufacturers engaged in a certain line of business, some of them owning patents and others of them owning no patents, by arrangements and conferences among themselves decide the terms and conditions that the so-called licenses shall contain, we have the strongest possible evidence that the agreements are not normal and usual licenses given by the owner of a patent, but are, in fact, agreements entered into for the purpose of accomplishing restraint of trade. The conferences and the simultaneous execution of all the license agreements on December 18, 1908, prove not only the combination between the defendants, but they establish also that each restriction was entered into in an abnormal and unreasonable manner and therefore is not a lawful qualification upon the use of the article.

As an instance of the effect of the enforcement of some of the conditions, we refer to the testimony given by Mr. Schwab (Vol. II, pp. 803-808). Mr. Schwab owned a rental exchange doing a prosperous business in Philadelphia. He had a customer in Baltimore. In order to get the films to Baltimore by eleven o'clock he sent them from his office in Philadelphia ten minutes to eight to catch the eight o'clock express to Baltimore. The time fixed for the release of the films was eight o'clock. Because Mr. Schwab dared to send the films from his office in interstate commerce ten minutes before eight he was fined \$100 by the defendants acting through the Motion Picture Patents Company. Yet there were exchanges in Baltimore distributing the same film which could release the film at eight o'clock, several hours before Mr. Schwab could get the film from Philadelphia to Baltimore if his shipment caught the eight o'clock train. The payment of the \$100 was a condition precedent to obtaining any further film. This is the sort of restriction which the defendants describe as a lawful and reasonable condition attached to the use of patented articles.

One of the rules imposed by the license agreement upon the rental exchanges was that each rental exchange should lease a minimum of \$2,500 worth of film per month. A failure to observe this requirement of the license agreement subjected the exchange to liability to have its license cancelled. Assuming, *arguendo*, that the film was patented,

we have to consider whether this requirement respecting the amount of film to be handled per month was a legal and reasonable condition attached to the use of the film and lawfully inserted in the exchange agreement. The proof shows that this restriction was not imposed by the owner of the patent, but was devised and approved by the rental exchanges and was at their instance inserted in the license agreement. Mr. Dyer, a witness for defendants (Vol. III, 1484, fol. 2), testified that the \$1,200 requirement contained in the rules of the Film Service Association, and made a part of the Edison exchange licenses of 1908, had been drawn up by the exchanges. He stated that in January, 1909, the change from \$1,200 to \$2,500 was made and incorporated in the exchange licenses issued by the Patents Company at the instance of the exchangemen. At Vol. III, 1485, fol. 2, he said:

My recollection is that this increase was made at the suggestion and request of the exchangemen themselves, who represented to us that at that time the exchange that did a smaller business than \$2,500 per month in the purchase of films would not be self-sustaining, and therefore would be open to the temptation of objectionable practices, particularly "duping,"¹ which was a common practice at that time.

¹ Duping had been largely practised by the defendants before they formed the combination (Swanson I, 321, fol. 4-322).

Mr. Aiken, Vol. IV, 2333, fol. 1, testified that the manufacturers did not have anything to do with the preparation of the rule.

In view of these facts how can it be urged that this requirement was a legal and reasonable condition imposed by the patentee upon the use of a patented article. It was not imposed by him but by others, and yet failure to meet this requirement was the sole excuse offered by defendants for the cancellation of a number of licenses. See principal brief of defendants, p. 150 (Philadelphia Film Exchange), p. 152 (American Film Exchange), pp. 152-153 (Duquesne Amusement Supply Company), etc.

The list printed as Appendix A to defendants' principal brief (pp. 418 et seq.) enumerates the following exchanges whose licenses were cancelled "because the exchange was not leasing the required minimum quantity of licensed motion pictures":

	Page.
American Film Service	418
Eugene Cline & Co., Chicago.....	419
Eugene Cline & Co., Salt Lake City.....	419
Harry Davis, Pittsburgh.....	420
Harry Davis, Buffalo	420
Harry Davis, Philadelphia	421
Duquesne Amusement Supply Co., Norfolk, Va.....	421
Kay Tee Film Exchange, Los Angeles, Cal.....	423
Philadelphia Film Exchange, Philadelphia.....	428
United States Film Exchange, Chicago.....	433

This was the sort of condition that was condemned by the Supreme Court in *Montague v. Lowrie*, 193 U. S., at page 47. In that case

would-be jobbers of tile were not admitted to the jobbers' association unless they at all times carried stock worth \$3,000. If they did not belong to the association they could not obtain tile from the manufacturers. The court, opinion by Mr. Justice Peckham, said this was an unlawful restraint of interstate trade.

II.

The evidence in the case of the Keystone Watch Case Co. contrasted with the evidence found in this record.

Since the arguments in this case the three circuit judges of this circuit have decided the case of *United States v. Keystone Watch Case Company*. The facts of that case are in striking contrast to the facts here presented. The history of the General Film Company differs from that of the Keystone Watch Case Company in two important particulars: First, in its manner of growth; and, second, in its conduct.

As to growth and expansion, in the Keystone case there was present no intent to absorb all competitors. In his opinion Circuit Judge McPherson reviews the separate acquisitions made by the Keystone Company pointing out the character of the business done by each company so acquired. The acquisitions had taken place over a long period of time and were unrelated to each other. They were small companies, most of them having

made watch movements, and only two or three having been engaged in the making of watchcases in competition with the Keystone Company.

Accordingly, on the facts the Keystone case is strikingly different from the *Harvester* case for the Harvester Company had been formed for the express purpose of taking over simultaneously the business of five companies, previously competing, doing over eighty-five per cent of the business in the United States in harvesting implements. Judge McPherson says in his opinion (p. 13) :

A merchant may without offense add one department to another as his business prospers or his ambition expands, for the size and the varied character of his enterprise do not in themselves violate the antitrust act. Size does not of itself restrain trade or injure the public; on the contrary, it may increase trade and may benefit the consumer; but if the power given by the volume of a particular business is improperly used to injure either a competitor or the public, or if such power evidently tends toward the injury of either, the mischief either done or threatened is condemned by the statute.

On the other hand, the General Film Company had been formed for the express purpose of acquiring the business of all the rental exchanges handling the films of the ten licensed manufacturers. This is proved by the minutes of the General Film Company. (See main brief, pp. 148-151 and 157-163.) The General Film Com-

pany not only commenced business with the intent just stated but it accomplished its intent. (See main brief, pp. 151-155.)

The oppressive methods employed by the General Film Company and the Motion Picture Patents Company in acquiring a monopoly were proven conclusively by the testimony of the Government witnesses. If a company refused to sell to the General Film Company its license was canceled by the Patents Company under the direction of the defendants, who were also directors of the General Film Company. Some exchanges had their licenses canceled to serve as examples to the others. These cancellations were published broadcast throughout the country on circulars and bulletins distributed to all remaining exchanges and to all theaters. On this point see main brief, pages 164 to 209. It is noteworthy that the testimony of not one of the Government's witnesses on the essential facts of cancellation was contradicted by any witness for defendant. Contradiction at most went to the subject of what was said at meetings, but defendants' witnesses did not deny the fact of cancellation, that meetings were had on the dates testified to by plaintiffs' witnesses, and the subject discussed was purchase or cancellation as the case might be.

For examples of circulars sent to rental exchanges and exhibitors see main brief, pages 219 to 232.

All the common stock of the General Film Company was taken by the ten manufacturers, each subscribing for \$10,000 stock, paid for in cash. All the preferred stock was issued in part payment for the exchanges purchased. The profit on this investment for the year 1911 is given in Government Exhibit No. 131, vol. I, 548. In that year Pathe Freres realized 1,649 per cent on its investment. This amount was what Pathe Freres received after payment of the dividend on the preferred stock, 12 per cent on the common stock, and after the General Film Company had paid out of earnings to pay for exchanges acquired by it about \$1,000,000. (See main brief, pp. 155-156.)

In the *Keystone* case, Judge McPherson said:

What is unreasonable restraint of trade?
On this subject we are certainly able to say some things with confidence. Competitors must not be oppressed or coerced. Fraudulent or unfair or oppressive rivalry must not be pursued.

There was an absence of such testimony in the *Keystone* case, but the record here abounds with oppressive and coercive methods.

III.

Not a single competitor testified that defendants' competition has been fair; scores testified to oppressive acts.

Defendants did not put on the stand a single competitor to testify in regard to the character of competition employed by the defendants. This

is a most significant fact. The International Harvester Company, in its defense in the suit brought by the Government, put on the stand scores of witnesses, manufacturers of all kinds of agricultural implements, who were asked to describe the business methods employed by the International Harvester Company. They put hundreds of retail dealers on the stand to testify that they had never been coerced by that company which the Government maintained was an unlawful combination. They put hundreds of farmers on the stand to give similar testimony.

As stated above, not a single competitor of defendants has testified in this case that the defendants were fair and reasonable in the conduct of their business and in their relations to competitors. On the other hand, numerous Government witnesses, manufacturers, rental exchangers and exhibitors, testified at great length and in much detail on this subject. Much of this testimony is reviewed in Part IX of the brief, pages 164 to 239. None of the testimony so given was contradicted by any of the defendants' witnesses. That is to say, in no case did the defendants dispute the fact that the supply of film had been cut off or that competitors had been put out of business as testified to by the Government witnesses. The only defense offered in any case was, that the rental exchanger or exhibitor, who had been deprived of the service, had violated in some manner the restrictions and conditions im-

posed by the license agreements. This defense was invariably denied by the rental exchangeman and exhibitor. Further, the defendants have maintained under the fourteen-day clause of the rental exchange license agreement the right to cut off supplies at any time, whether or not the exchange had violated any of the terms of the license agreement. In many cases, the Patents Company and defendants acted under the fourteen-day clause, in which case no excuse has been or can be offered to justify their arbitrary and unreasonable action.

In view of the rapid expansion of the General Film Co., which acquired a total of 57 exchanges in the last seven months of 1910, although it did not commence business until June, 1910, it seems futile for defendants to deny that the General Film Co. was organized for the purpose of acquiring them, and in view of the minutes (see main brief pp. 157-163) it seems futile for defendants to deny any intent on the part of the General Film Co. to monopolize the business. It is incredible that any one could entertain seriously the statement made in defendants' principal brief, at p. 208:

The idea in forming the General Film Co. was to form a sort of "model exchange that might serve as an example for all the exchanges then operating." (Smith, III, 1700.)

Mr. Smith, to whom counsel refer, and who gave the testimony, is one of the defendants in this suit.

Before Mr. Smith entered the motion-picture field he was engaged in the entertainment business. He was a sleight of hand performer, ventriloquist, shadowgraphist, and impersonator of various characters. (III, 1740, fol. 3.) And on page 213 of their brief they make this statement:

The General Film Company was, to the majority of the producers, a questionable experiment and one upon which they entered with much misgiving.

And on page 218 of their brief they say:

The acquisition of the property of the exchanges was a development of the experiment which followed the initiative of the owners of rental exchanges who desired to sell. (Dyer, III, 1676.) * * * After many of the exchanges had been offered to the General Film Company everybody knew that it would be larger than they had thought at the beginning.

IV.

Manufacturers who had never owned any of the patents share in the so-called "royalties."

In February, 1909, when the license agreement went into effect, there were several thousand exhibitors in the United States. Each of these owned and was using a projecting machine which he had bought outright before that time. That is to say, upon the sale of the projecting machine to him no condition had been attached to the use of

the machine by him. Marvin testified that the Edison Co., Pathe Freres, Selig Polyscope Co., Essanay Co., and Lubin Co. had sold machines outright prior to December, 1908, without attaching any conditions to their use. (I, 28, fol. 4.) By means of their combination, the defendants imposed in the form of a royalty the payment of \$2 a week by each exhibitor who had bought a machine prior to February 1, 1909. Twenty-four per cent of the exhibitors' royalties was divided among the nine manufacturers, five of whom were the companies named above, who had theretofore sold the machines without restrictions. This 24 per cent of the royalties was divided among the manufacturers who had not assigned any patents to the Patents Company. In regard to the collection of these royalties see Vol. I, p. 26, fol. 4, to p. 29, inclusive, and Vol. I, p. 127, fol. 4, to p. 129, inclusive.

It is manifest that in enforcing the collection of this royalty the defendants were not attaching any legal and reasonable condition to the use of patented articles. The payment was compelled by the united action of all the defendants. The profits went to all the manufacturers regardless of whether or not the manufacturer had assigned any patent to the Patents Company.

If the \$2 a week royalty was not paid by the exhibitor he was able to obtain no film from any of the manufacturers. They cut him off from all supplies of film. The euphemistic term, how-

ever, used by them in refusing supplies was to state that his "license had been canceled."

To-day defendants maintain that the 4 Latham, Armat-Jenkins, Pross, and Smith patents control the projecting machines. Prior to 1909 they scorned those patents, but after they acquired them they compelled the exhibitor to pay for their (defendants') alleged infringement in selling thousands of machines prior to 1909.

V.

THE EXTENT OF THE MONOPOLY ACQUIRED BY THE GENERAL FILM CO.

It has monopolized the business of distributing the films of the 10 mfrs. as its only competitor is the Greater New York Film Rental Co., whose per cent of the business is negligible and limited to the vicinity of New York City.

The witness Matthews testified that there were on July 21, 1913, 6,867 licensed theaters (V. 2935). On July 7, 1912, before the filing of this suit, according to the records of the same witness, there were 6,571 licensed theaters (V. 3035). These theaters were and are scattered all over the United States.

The General Film Company monopolizes the business of distributing films to these theaters, except in so far as a very small per cent of the business is done by the Greater New York Film Rental Company (Mr. Fox's company), the sole survivor of the 116 exchanges which handled licensed film in the early part of 1909. The Gen-

eral Film Company enjoys this monopoly by virtue of the fact that it is owned by the ten manufacturers and is constituted by them their sole distributing agency. Before the General Film Company was organized there were over 100 exchanges doing the business which it now controls. Elsewhere we have stated the methods by which it acquired the business of those exchanges.

In our main brief (Part X, p. 239) there is printed a list of exhibitors, all witnesses called on behalf of defendants, who testified on cross-examination that the films manufactured by the so-called licensed manufacturers are necessary in order to conduct a profitable business as an exhibitor. This is the testimony of defendants' own witnesses. The business of distributing this class of film to all the exhibitors has been monopolized by the General Film Company. No exhibitor, licensed or unlicensed, in the United States can obtain any of the film of any of the ten licensed manufacturers from any other source than the General Film Company (except, of course, the Greater New York Film Rental Company, as above stated in New York City). This is a monopoly of a part of the trade and commerce among the several States within the meaning of section 2 of the Sherman Act, which provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce

among the several States, shall be deemed guilty of a misdemeanor.

In the *Union Pacific* case, the business which was competitive between the Union Pacific and the Southern Pacific was but a comparatively small part of the sum total of all the traffic carried over the two railroads, comprising only .88 (less than one) per cent of the tonnage of the Southern Pacific and 3.10 per cent of the tonnage of the Union Pacific (226 U. S., 76). It was urged by the railroads that, in view of this fact, only an incidental restraint of trade had resulted from their combination such as ought not to be held within the law. The court, however held (p. 88) that this was a part of commerce within the meaning of the statute. (See our main brief, pp. 258, et seq.)

Mr. Fox testified that the largest theaters in New York are licensed theaters. He testified on February 27, 1913, that 95 per cent of the large theaters in Greater New York are licensed by the Patents Company. He said he did not know of more than one place where unlicensed pictures were shown in a large theater; and that the same was true in Newark, Springfield, New Haven, and Bridgeport (II, 699, fol. 2). This testimony was not contradicted.

Mr. Sawyer, of the Kinemacolor Company, testified that more of the higher type houses in the United States used licensed service than unlicensed (II, 741, fol. 3).

Mr. Karson, a Philadelphia exchange man, testified that 75 per cent of the theaters in Philadelphia are licensed (II, 1097, fol. 4).

Defendants argue that the business done by the ten manufacturers must be looked at as part of the entire motion-picture business, and that a monopoly of the distribution of the business of the ten manufacturers does not constitute a monopoly of a part of trade and commerce within the meaning of the Sherman Act. This proposition we dispute. However, even if the business of the ten manufacturers should be looked at from the defendants' point of view and be considered in its relation to the total business, it is still manifest that the General Film Company does much more than half of the total motion-picture business in the United States. The only two competitors of the ten manufacturers who distribute film generally throughout the United States are the Mutual Film Corporation and the Universal Film Company. Mr. Frank L. Dyer, president of the General Film Company, a witness for the defendants, testified that the General Film Company's weekly service constitutes 61 reels, while the Mutual distributes only 26 a week and the Universal 28 (III, 1579, fols. 3-4, and 1580, fol. 1).

The evidence of defendants in regard to the extent of the independent business was confined to testimony given by managers of the General Film Company and by certain of the defendant manu-

facturers. Defendants did not call a single independent manufacturer or distributor to testify as to the per cent of business done by the defendants or by the independents. *Therefore, the record is barren not only of evidence from competitors as to the character of the competition conducted by defendants but also of any evidence from independent competitors as to the amount of independent competition that exists in the country.*

Defendants' counsel, however, point to the testimony of John Collier, of the national board of censorship (V, 2894, 2903, 2910, and 2940 to 2941). (Defendants' main brief, p. 275.) The figures he produced show that the number of reels produced by the licensed manufacturers has always exceeded the combined total of the Universal and the Mutual. However, the number of reels released does not accurately indicate the per cent of the production. Many positive prints are made from every negative produced by the licensed manufacturers. If they produce 62 new pictures a week there will be several thousand reels distributed, owing to the fact that there are thousands of theaters which take the licensed pictures. On the other hand, an independent manufacturer, not having the same means of distribution, may sell only a few copies of his picture. Therefore, a comparison of the weekly releases conveys no adequate idea of the amount of business done by the respective companies making the reels. The General Film Company is the most potent factor in the business, as

it controls the distribution. It distributes no product except that of the licensed manufacturers who own it.

VI.

The relation of the patent laws to the Sherman Act.

Defendants assert that their commerce is outside the prohibitions of the Sherman Act. It would seem that the cases cited in our main brief, Part III, pages 13 to 29, furnish a complete answer to their contention in that regard.

The owner of a patented article does not derive the right to sell the patented article from the patent laws. The right to sell is a common-law right that adheres to the ownership of any article. In this respect a patented article differs from no other article. The exercise of the right to sell or to distribute in commerce is not a right derived from the letters patent but is a natural right. Therefore this right to distribute in commerce is subject to the laws of the land when exercised in respect to patented articles in the same manner as it is subject to the laws of the land when it is exercised by anybody else in respect to any kind of property not patented.

In *Webber v. Virginia* (103 U. S., 344, 347) Mr. Justice Field said:

Congress never intended that the patent laws should displace the police powers of the States, meaning by that term those

powers by which the health, good order, peace, and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits.

See also *Patterson v. Kentucky*, cited in our brief, pages 25–26. In the latter case the Supreme Court held that, in selling and distributing in commerce patented oil, the patentee was not exercising any rights conferred by the patent letters. In enacting the statute under consideration in the *Patterson* case, the Legislature of Kentucky had invoked the exercise of its police power. The subject matter affected happened to be a patented article. A law by the State of Kentucky prohibiting combinations in restraint of trade and prohibiting the selling of articles pursuant to combinations in restraint of trade is also an exercise of the police power of the State. If the policy of the State, as declared by its legislature, is that such combinations are against the best interests of the people, it is not for the courts to question the policy of the legislature. It is clear that a State statute directed against combinations in restraint of trade would apply to patented articles exactly the same as to unpatented articles. If, under the *Patterson* decision, patented articles which are injurious to the public may not be distributed or sold, it is clear that patented articles may not be sold or distributed *in a manner* which the legislature deems *injurious to the public*.

Of course, when we come to consider combinations in restraint of interstate commerce, the power of Congress to declare such combinations unlawful is derived from the commerce clause of the Constitution. The source of power is different from the source in the case of the State, but the exercise of the power in each case arrives at the same result, i. e., prohibition of restraints of trade or monopolies. Under the *Patterson* decision, the distribution of patented articles in intrastate commerce is subject to the police power of the State. In the same way the distribution of patented articles in interstate commerce is subject to the regulations of ~~the courts~~ ^{Congress} by virtue of the commerce clause. [Mr. Moon's brief at the bottom of p. 86 inaccurately states that we attempt to interpret the Sherman Act as an exercise of police power, and it makes the same mistake in considering the argument made for the Government in *U. S. v. Stand. San. Mf. Co.*]

VII.

The fact that defendants leased films instead of selling them constitutes no defense—the form is immaterial.

The moment that a patented article enters interstate commerce it becomes subject to the rules of commerce applicable to restraint of trade the same as any other commodity. Any combination which unreasonably interferes with the free flow of commerce is a violation of the Sherman Act, regardless of the form that may be employed in any particular

case. In the case at bar the defendants adopted the method of leasing film. In this way they say they reserve title to the film and therefore may determine to the last detail the manner in which the film shall be distributed in commerce. Assuming, *arguendo*, that the film is a patented article, we maintain that the adoption of the lease system by the defendants was a mere form given by them to the combination for the purpose of bringing about the unlawful result. In their answer they state (Ans. Patents Co., fols. 314-319) the sole reason for expressly framing the license agreements in the form of a lease was to facilitate the peremptory return of the articles by means of a writ of replevin in the event of a violation of the terms of the agreements. (See main brief, pp. 215-219. See also main brief, p. 168, where a Government witness gave uncontradicted testimony that an attorney for the Patents Company stated in his presence that these replevin suits were being brought mostly to scare the people engaged in the business around through the country.)

In *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S., 373, a manufacturer adopted a scheme of agency contracts for the purpose of controlling the distribution in commerce of his products. The articles which he manufactured were not patented articles. He attempted, however, to retain title to those articles and, by means of agency contracts, to fix prices of wholesalers to retailers and prices of retailers to the public. The Su-

preme Court in an exhaustive opinion by Mr. Justice Hughes condemned the arrangement. It held that putting the restraints in the form of restrictions contained in agency contracts did not make the scheme a lawful one.

The case at bar is far stronger than the *Dr. Miles Medical Co.* case, for the decision there concerned the acts of a single manufacturer distributing his product in commerce. There was no combination in that case. There was no attempt to control by agreement of numerous manufacturers the distribution of the products of each. Here we have a case where every restraint and unlawful condition was adopted by agreement of the different manufacturers.

Subsequently, in *Bobbs-Merrill Co. v. Straus*, 210 U. S., 339, and in *Bauer v. O'Donnell*, 229 U. S., 1, the Supreme Court applied to copyrighted books and to patented articles the ruling which it had made in the *Dr. Miles Medical Co.* case in respect to unpatented articles. It is true that in the latter cases there was no attempt to retain title. That, however, does not affect the case. "The Sherman Act embraces every conceivable act which can possibly come within the spirit or purpose of the prohibitions of the law without regard to the garb in which such acts are clothed." (Mr. Chief Justice White in the *Tobacco* opinion, 221 U. S., 106.)

The *Sanatogen* case decided that the patentee may not control the price from the jobber to the

retailer of the patented article sold to the jobber by the patentee. The article having entered the channels of commerce is subject to the laws applicable to commerce in other articles. The fact that it is a patented article does not confer upon the original owner any peculiar property right which inheres in the article and enables him to control its resale. Therefore, as at common law, the fixing of a retail price of an article by the original owner is a restraint of trade, so in the case of a patented article the fixing of the retail price is a restraint of trade.

If the patented article is to be considered the same as an unpatented article where the retail price is concerned, and if the fixing of the retail price is as unlawful in one case as in the other, so in other respects commerce in patented articles must conform to the law in the same way that the trade in unpatented articles must do so. The *Sanatogen* decision means more than that the fixing of a retail price on patented articles is a restraint of trade; it is an authority to the effect that wherever in commerce a condition attached to the sale of an article is a restraint of trade it is also a restraint of trade when applied to the sale of a patented article. On principle it is a clear authority that after they have entered the channels of commerce patented and unpatented articles are governed by the same rules.

But defendants stoutly and repeatedly assert that in the *Sanatogen* case the patentee had parted

with the title. That makes no difference. He could not have retained title for the express purpose of accomplishing a result which would have been an unlawful restraint of trade had he parted with title.

We very respectfully maintain that the position of the court is controlled by the decision of the Circuit Court of Appeals of the Third Circuit in *National Harrow Company v. Hench*, 83 Fed., 36, cited in our main brief at page 28. Judge Moon suggests that that case is not applicable, for the reason that it dealt with suppression of competition while the patents in this case were not competing patents. Even if there be the difference he suggests between the cases, to which we do not agree, we maintain that a decision holding that patents may not be used to suppress competition is a direct holding to the effect that patents may not be used to accomplish other forms of restraint of trade. Unreasonable suppression of competition between manufacturers in interstate commerce is merely one of many forms of restraint of trade. Numerous cases of the Supreme Court have presented no suppression of competition, but clear and unreasonable interference with commerce. Such cases were the *Cotton Corner* case, *U. S. v. Patten*, 226 U. S., 525 (main brief, pp. 271-274); *U. S. v. Pacific & Arctic Navigation Co.*, 228 U. S., 87 (main brief, pp. 280-282); *U. S. v. Eastern States Retail Lumber Dealers' Assn.*, 234 U. S.,

600 (main brief, pp. 291-295); *Steers v. U. S.*, 192 Fed., 1; *Loewe v. Lawler*, 208 U. S., 274.

Therefore, a decision which holds that patents are no justification when the restraint of trade is accomplished by the suppression of competition is an authority for the proposition that other forms of restraints of trade may not be brought about by the use of patents in the form of a license arrangement. Since the formation of this combination and its entrance upon active operations in January, 1909, the defendants through the Patents Company have brought hundreds of replevin suits. They have cut off hundreds of exhibitors and rental exchanges from supplies of film. These facts are set out in detail in our main brief and, therefore, we shall not here attempt to review the evidence in that regard. It is always to be remembered in considering the facts in this case that the term "your license is cancelled" is the euphemistic equivalent for "you can secure no more supplies of film from 10 manufacturers."

The *Rubber Tire* cases have never been the law in this circuit. The Supreme Court refused to follow them in the *Bathtub Trust* case although chiefly relied on by defendants in that case.

It is true, as defendants assert in their brief, that a patentee may withhold from the public the use of his patented article. Another patentee may do likewise in respect to a patented article owned

by him. But two patentees in making and observing an agreement to keep from the channels of interstate commerce their respective articles are not exercising patent rights. In such a case their action is combined action, the legality of which must be determined by the laws applicable to combinations.

VIII.

Defendant Marvin was the only witness called by defendants to describe the patents; this branch of their case rests entirely on the testimony of this interested witness defendant.

Judge Moon, in his brief, page 48, says:

The only testimony in the case as to the office and function of these patents was the testimony given by Harry N. Marvin, who demonstrated and illustrated the above stated facts of their complementary and interlocking character, and who further demonstrated the fact that neither of these articles, to wit, the camera, the film, or the projecting machine have any function whatever, except in combination with the other patents.

Mr. Church states a number of times in his brief in regard to the testimony of Mr. Marvin on the subject of patents:

This testimony of Mr. Marvin stands uncontradicted and unchallenged by any other evidence in the case. (Mr. Church's brief, pp. 70, 72.)

Mr. Marvin was the only witness called by the defendants to testify as to the function of the patents, but it is not in any respect accurate to state that his testimony stands uncontradicted and unimpeached.

Mr. Marvin's testimony as to the value of the patents and their functions is contradicted by his own words and by his own actions prior to the formation of the combination. His testimony is refuted by the actions of the defendants as proven in the record. For instance, Mr. Marvin's testimony in this case as to the value of the film patent is directly contradicted by his own statements respecting the film patent, made in 1908, and his testimony is also contradicted by his actions in selling and distributing film for many years prior to the formation of the combination. To-day he says that the patent is good and that before 1909 he was infringing the film patent, but before the combination was formed he asserted he was not infringing the film patent and that the patent was valueless. In each case he takes that position which at the moment is most favorable to his own interests. In stating this fact we are not intending to reflect upon Mr. Marvin's veracity; we are merely drawing attention to the fact that the character of his testimony is affected by his interest. The interest he has at stake makes him a biased and unreliable witness.

Similarly, Mr. Marvin's testimony in regard to the Latham and Smith patents is contradicted by

his actions prior to the formation of the combination, for at that time he paid no attention to those patents, having used the loop on his machines for years without regard for the Latham patent. To-day he says that all the patents are complementary and indispensable and that, combined, they entitle one to monopolize the art, but prior to the formation of the combination his contentions in respect to each patent were directly the contrary.

Why did the defendants fail to put on the stand any witness with expert knowledge to testify as to the value of the patents and as to their real use in the art? Manifestly, the testimony given by Mr. Marvin is not entitled to any weight, contradicted as it is by all the acts of the defendants and by their admissions. From its formation Mr. Marvin has been one of the important officers of the Patents Company. He has at all times been an officer, director, and stockholder of the Biograph Company. He has been prominently identified with the General Film Company. He it was who generally took the initiative in causing the cancellation of the license of exchanges and exhibitors. There is no man in the motion-picture business who has a greater interest than Mr. Marvin in having this combination upheld, and yet he was the only one whom the defendants were able to find to support their position on the subject of patents.

His testimony as to the Latham patent is contradicted also by the statements of Mr. Dyer made

prior to the combination and by the statements of Mr. Berst.

A cursory examination of Talbot's work, "Moving Pictures and How They are Made," and Gibson's "Romance of Modern Photography" furnishes convincing evidence of the want of substance to the claim that the six patents dominate the art.

IX.

Only six of the sixteen patents enumerated in the agreements are to be considered—defendants have abandoned the other ten.

Counsel for the defendants in the course of their arguments acknowledged the accuracy of the statement made during the opening of counsel for the Government, that only six of the sixteen patents named in the license agreement are relied on by them. (See also Mr. Church's brief, p. 12.) We maintain that the licensing arrangement under patents was adopted for the express purpose of effecting a combination in restraint of trade the unlawfulness of which would have been obvious if it had not been given the mask of patents; that the insertion of ten patents, which are now conceded to be so inconsequential as not to have been mentioned in six volumes of testimony or in the prolonged briefs and arguments of counsel for the defendants, were inserted in the licenses for the express purpose of giving the licenses a more im-

pressive appearance and to make it more difficult to analyze the agreements and make certain their real character.

X.

The six patents analyzed.

(1) LATHAM PATENT.

This is known as the Loop patent. It was one of the three patents assigned by the Biograph Company December 18, 1908, to the Patents Company. It was issued August 26, 1902 (No. 707934), to E. & H. T. Anthony & Co. The Anthony Company owned the patent until the fall of 1907 when it was acquired by the Ansco Company which took over the assets of the former company. (Anthony IV, 2073, fol. 2.) The Anthony Company had spent in the neighborhood of \$11,000 to have the patent issued and carried the patent on its books at a valuation \$10,000. (IV, 2066, fol. 3.)

J. J. Kennedy, on behalf of the Biograph Company, acquired the patent February 15, 1908, from the Ansco Company, paying \$2,500.

Neither the Anthony Company nor the Ansco Company had brought any suit on the Latham patent to prevent infringement, although the defendants assert that all the defendants during that period had infringed the patent. The defendants put on the stand two witnesses to testify that the Anthony and Ansco Companies were financially weak and unable to bear the cost

of litigation. The Anthony Company had notified the Edison and Biograph Companies in the latter part of 1902 or the early part of 1903 that they were violating the Latham patent. (IV, 2067, fol. 3.) Those companies disregarded the notice. The patent was acquired by the Biograph Company shortly after that company had declined to join the Association of Edison Licenses, which commenced to do business about February 1, 1908, under the so-called Edison licenses. As soon as the Biograph Company obtained the patent it brought numerous suits against the Edison Mfg. Co., Edison Manufacturing Licensees and a few suits against exhibitors using the films of the Film Service Association and against rental exchanges identified with the Film Association. These suits were undoubtedly brought as a retaliation for the numerous suits instituted on the film reissue patent about the same time by the Edison Co. against the Biograph Company and its exchanges and exhibitors although this purpose was denied by Mr. Marvin. (III, 1288.)

The Latham patent applies to a detail of construction in the projecting machine. It has been held by the Circuit Court of Appeals for the Second Circuit not to apply to cameras. (See decision printed in full in Vol. VI, 3393 et seq.) The headnote says:

The Latham patent No. 707934 for a projecting kinetoscope can not be construed as to any of its claims as in any way a camera,

but must be limited to a projecting apparatus. So construed, held not infringed.

The only part of the projecting machine covered by the Latham patent is the so-called loop which is a detail of construction. The defendants, however, use the terms "Latham projecting machine" and "Latham camera" to indicate a camera or projecting machine in which there is a loop in the film, although none of the other parts of the complicated projecting machine or camera are affected by this patent. (See Marvin, VI, 3289, fol. 4.)

Marvin testified that the Latham patent had been infringed by everybody ever since it had been issued. (I, 124, fol. 1.)

In March, 1908, Dyer said that the Latham patent "relates to a detail in the construction of the projecting machines." (V, 2521, fol. 4.) "I do not look upon the Latham patent as a serious thing, in fact it is nothing but a joke in the business. Ever since its issue in 1902 my company has been importuned to purchase it, but I have always regarded it as so unimportant as not to warrant serious consideration." (V, 2522, fol. 1.)

The above statement was published in the Show World of March 21, 1904.

A week later Dyer said, as published in the Show World of April 4, 1908:

The Latham patent was granted August 26, 1902, and according to the people who

are now affirming its validity it has been infringed by everyone since that time. Why was it not litigated to a final hearing, as was done with the Edison camera patent? Obviously, because the owners thought so little of its validity that they did not care to incur the expense of a suit. (II, 922, fol. 4.)

Mr. Dyer admitted making the above statements. (III, 1669, et seq.; see our main brief, pp. 114-119.)

J. A. Berst, of Pathe Freres, published articles in the trade papers in 1908 informing the trade that the Latham patent was of no value. But the defendants called Berst to testify that what he had said in 1908 he did not believe at the time to be true. As a witness for the defendants Berst testified that he always believed the Latham patent to be of value. But Berst's interests are different to-day from what they were in 1908. On cross-examination he admitted that he published a statement which he knew to be untrue in fact in order to protect his business, and that he was willing to say something untrue and false and which he knew to be untrue and false in order that he might protect his business. (IV, 1957, fol. 1.)

Such is the history of this patent, and yet these defendants, unless this court adjudges the combination to be unlawful, propose to continue their illegal licensing arrangement under the Latham patent until the expiration of this patent in 1919. The Latham patent has a longer period to run than

any of the other patents assigned to the Patents Company. The manufacturers' license agreement provided that the licensee might renew the agreement by giving notice to the licensor before April 20th of each year until August, 1919, the date of the expiration of the Latham patent. (See section 21 of the manufacturers' agreement, Ex. 3 to petition, p. 76.)

(2) THE SMITH PATENT FOR THE FRAMING DEVICE.

This is No. 673329, granted to Albert E. Smith April 30, 1901, for improvements in the kinetoscope or projecting machine.

The Vitagraph Company assigned six patents to the Patents Company, all relating to projecting machines. Although these six patents are enumerated in the various licenses there is no word of testimony relating to five of them, the patent named above relating to the framing device being the only patent considered of sufficient value by defendants to be referred to in evidence and arguments.

This patent is for an *improvement* in the projecting machine, and for nothing else. The framing device is something which makes the projecting machine a better machine than it would be without the device. It, however, is nothing more than an improvement. The fact that the improvement is patented does not entitle the patentee or owner of the patent on the framing device to im-

pose restrictions upon the use of the projecting machine and upon commerce in positive films which contemplate an absolute control of that commerce.

Mr. Albert E. Smith, the inventor of this device, in the course of a long examination as a witness for the defense, testified in regard to this patent at the following places in the record: Direct examination, III, 1715, fol. 4, to 1717; cross-examination, III, 1757, fols. 1 and 2. Mr. Smith, on page 1716, describes the framing device. He says that he considers that this improvement on the projecting machine had great potency and value in building up the business. On page 1757, fol. 1, he says the patent made an improvement on the projecting machine.

(3) THE JENKINS-ARMAT PATENT.

This is No. 586953, granted July 20, 1897, to Charles F. Jenkins and Thomas Armat. It has, therefore, expired.

Although the Armat Company assigned five patents to the Patents Company, all of them enumerated in each of the license agreements, the only one of the five referred to by defendants in the proof and arguments is this Jenkins-Armat patent.

This patent relates to the shutter of the projecting machine. No other part of the complicated projecting machine is covered by the Jenkins and Armat patent. Vol. VI, pages 3266 et seq., con-

tains certain photographs and diagrams of defendants' exhibits. Defendants' Exhibit No. 182 is labeled "Jenkins and Armat projecting machine" and Mr. Marvin testified that it is given this name because it has the shutter known as the Jenkins and Armat shutter. (VI, 3287, fol. 2.) Defendants' Exhibit No. 183 contains the picture of a projecting machine entitled "Modern projecting machine" and another machine entitled "Armat projecting machine." Mr. Marvin testified on cross-examination that there is no difference between these two except the difference in the shutters; one has the Pross shutter and the other the Jenkins and Armat shutter. By reason of the difference in the shutter he terms the one with the Pross shutter a "modern projecting machine" and the other one the "Armat projecting machine." Mr. Marvin also said that the use of the Pross shutter has supplanted the use of the so-called Armat shutter. (VI, 3287, fol. 4.)

If this be true, the Jenkins and Armat patent had no value to the combination, for it was no longer of value in the art, as, according to Mr. Marvin, the Pross shutter had supplanted it. In any event, prior to the combination of 1908, not one of the defendants (excepting the Armat Company) had paid any attention to the patent or considered it of any value. At the time the combination was formed, there were five or six thousand exhibitors in the United States using pro-

jecting machines, but the Armat Company had never sold a projecting machine and none of those in use at that time had been licensed by it. Thomas Armat testified that the Edison Company had been the most flagrant infringer of this patent.

We submit from the facts and testimony in this case it is clear that the Armat patent had no real value and, like the other patents conveyed by the Armat Company served as a blind or mask to conceal the true purpose of the combination.

The only witness called by defendants in regard to the history of the Armat patent was Thomas Armat. (IV, 2118 to 2138 and 2158 to 2185.) The testimony given by Mr. Armat related to remote and immaterial matters mostly occurring in 1901 and 1902. He failed utterly to establish any value in this patent, which was the only patent in respect of which he gave any testimony.

Mr. Armat is president of the Armat Moving Picture Company. He produced certain licenses or contracts under the patent No. 586953 issued in 1900, 1901, and 1902 to Burton Holmes and others; these licenses having been terminated years before the combination in 1908, their introduction was objected to by counsel for the Government on the ground that they were immaterial and too remote. (IV, 2118 to 2125.)

The Armat Company brought a lawsuit against the Biograph Company in 1900. (IV, 2125, fol. 4.) Mr. Armat produced certain circulars or

warnings to alleged infringers of the patent, but the circulars introduced by him were all issued in the years 1900 to 1902. (IV, 2125 to 2133.)

The Armat Company brought a number of suits during the years 1901 to 1903, which were enumerated by Mr. Armat. (IV, 2134, fol. 4.) They started a suit against the Edison Manufacturing Company November 28, 1903, and obtained an injunction against that company January 8, 1903. (IV, 2135, fol. 4.)

Mr. Armat testified that the litigation between his company and the Edison Company was "actively prosecuted," but that it never reached a final determination in the sense of being ended by a final decree of the court. (IV, 2137, fol. 4.) He said it was prosecuted until the Edison Company accepted a license under the patent (IV, 2137, fol. 4), which was in December, 1908. On cross-examination it developed that the injunction obtained against the Edison Company was vacated after a reversal by the Court of Appeals, and after June, 1903, the Edison Company continuously manufactured and sold projecting machines (IV, 2180, fol. 1), all of which machines Armat contended infringed his patent.

When cross-examined as to the meaning of the term "actively prosecuted," used by Mr. Armat on direct examination in stating that the Edison suit had been actively prosecuted, these facts developed: Up to December, 1908, when the Patents Company was organized, there had been no final

adjudication on the merits and on the testimony taken in the case. (IV, 2180, fol. 3.) This was a period of about six years. In that time one volume of testimony had been taken and about a dozen witnesses, or an average of two witnesses a year, had been called. (IV, 2181, fol. 2.) One witness gave a great deal of testimony. (IV, 2181, fol. 4.) This witness was Mr. Armat. (IV, 2183, fol. 2.)

Of the various suits brought by the Armat Company and enumerated by Mr. Armat the Armat Company selected the suit against the Edison Company as the test suit. (IV, 2185, fol. 3.) In none of the other suits had any testimony been taken. (IV, 2184-2185.) Therefore, to sum up the litigation on the Jenkins and Armat patent, though a number of suits had been brought, only about twelve witnesses had been summoned in a period of six years and no adjudication had been reached.

In view of these facts we submit that the statements contained in Mr. Church's brief at the top of page 68 do not convey an accurate impression as to this patent.

The following are all the cases dealing with this patent: *Armat Moving Picture Company v. American Mutoscope Company*, 118 Fed., 840; *Armat Moving Picture Company v. Edison Manufacturing Company*, 121 Fed., 539; *Armat Moving Picture Company v. Edison Manufacturing Company*, 125 Fed., 239. In the case against the Edison Company a temporary injunction was

granted. This was reversed by the Circuit Court of Appeals with costs.

In the case against the Mutoscope Company, which was the predecessor of the Biograph Company, the Armat Company obtained an injunction. The litigation with the Mutoscope Company was concluded in October, 1904 (Armat, IV, 2184, fol. 1), when the two executed the paper defendants' Exhibit No. 129 (IV, 2164, fol. 5), by which it was provided that the Biograph Company should withdraw its appeal from the injunction, but should pay no royalty to the Armat Company until the Armat patent had been sustained in the Edison suit in the Court of Appeals. As the injunction against the Edison Company was reversed, the Biograph Company never paid any royalty. (IV, 2184, fol 1.)

Mr. Armat testified that the Edison Manufacturing Company were the chief offenders in infringing the patent. (IV, 2173, fol. 1.)

On cross-examination he said the Armat Company never sold a single machine at any time or at any price. (IV, 2179, fol. 1.) He did not think there were any patent licenses by his company in use in the United States in December, 1908, although there were at least 5,000 or 6,000 theaters exhibiting motion pictures, all of which, according to him, were infringing his patent. The principal vendors of those projecting machines had been the Edison Manufacturing Company and the Powers Company. Those machines had been sold

outright to the purchasers, that is, without conditions attached to the sale. (IV, 2179, fol. 4.)

Mr. Kennedy, of the Biograph Company, acquired an interest in the Armat Company before the Patents Company was formed. (IV, 2178, fol. 4.)

Although Mr. Armat produced in court papers and licenses with a number of exhibitors executed in 1902 and terminated five or six years before the Patents Company was formed, he made no effort to bring any correspondence of a later date or any papers having a closer bearing upon any of the issues in this case.

(4) THE PROSS PATENT.

This patent relates to the form of the shutter. Mr. Marvin testified that the use of the Pross shutter has supplanted the use of the so-called Armat shutter. (VI, 3287, fol. 4.) Therefore, these two types of shutters are competing.

Although the Pross patent was issued March 10, 1903, the Biograph Company brought no suit for infringement until the spring of 1908. About the time the Edison Company bombarded the Biograph faction and their customers with suits on the film patent the Biograph Company retaliated with suits under the Pross and Latham patents. The Biograph Company did not pay anything for the Pross patent as it was issued to one of its employees who according to his contract of employ-

ment, assigned the ^{I, 25}patent to the Biograph Company. (Marvin, ~~4123~~.) No witness testified as to the value of this patent except Marvin.

Although Mr. Marvin contends that this is a valuable patent, the answer of the defendants makes this statement (Ans. Patents Co., p. 26, fol. 60):

Prior to 1908, the great value of the Pross invention was not appreciated except by the Biograph Company.

Mr. Church's brief states (p. 82) that the patent has been acquiesced in by thousands of licensees, including manufacturers, exchanges, and exhibitors. There is no testimony in the record supporting this statement except in so far as manufacturers, exchanges, and exhibitors taking licenses from the Patents Company, which licenses enumerate sixteen patents, may be considered, by the act of taking the licenses, to acquiesce in the validity of the patent.

(5) FILM PATENT.

As pointed out in our main brief (p. 56 and p. 84), the film patent is the only patent under which a license was granted by the exchange license agreement. That is to say, the right asserted by defendants to dominate and regulate the business of exchange men rests entirely upon the exchange license agreement, and that agreement purports to grant rights only under the film patent and no other patent. (See Pet., p. 80, Ex. 4, clause 1.)

We have pointed out in our main brief that the film reissue patent, No. 12192, was a reissue of the fifth and sixth claims contained in the original patent, No. 589168, and that this latter patent had been held invalid in 1902. Although the film claims were reissued under No. 12192 in January, 1904, from January, 1904, to February, 1908, no suit of any kind under that patent was pressed by the Edison Company against any manufacturer. Throughout that four-year period numerous manufacturers were importing films, making them in this country and distributing them widely in the United States. (See our brief, pp. 104-105.) It is true that in that period the Edison Company started four suits on 12192, but in only one of those cases (the Schneider case) was any testimony taken, and in that case only two witnesses were examined during the four years. Such inaction on the part of the Edison Company is the strongest kind of evidence that the company considered the patent valueless after Judge Wallace's opinion. During those four years the Edison Company did not bring a single suit against a theater exhibiting films, but when the Biograph Company refused to join the Edison Company, early in 1908, the Edison Company at once started innumerable suits under the film patent all over the United States against the theaters which were customers of the Biograph Company and of George Klein, an importer. As pointed out in our main brief (p. 126), Judge Kohlsaatt, in Chicago, stated

that unless the Edison Company stipulated not to bring any more such suits he would enjoin them from doing so.

After the combination was formed in December, 1908, the defendants set up the film patent as the foundation of the licensing arrangement.

The film patent has been sustained by no court. The Circuit Court of Appeals of the Second Circuit held, in 1902, that it was not patentable, and *the Supreme Court denied a petition for certiorari to that decision.* (186 U. S., 480.) The Court of Appeals of the District of Columbia, opinion by Chief Justice Shepard, has also squarely decided that 12192 is an invalid patent.

Mr. Church refers in his brief (p. 47) to an action on 12192 brought by the Patents Company in New Jersey on April 9, 1913, almost a year after the Government commenced this prosecution, and more than nine years after the patent was re-issued. We submit that an action brought under such circumstances can have no bearing on this case. Throughout these nine years other manufacturers have openly and continuously manufactured and distributed films in this circuit and throughout the United States, but the defendants took no legal steps until they thought it might help to say to the court in this case that there is an action pending on 12192 in this circuit, upon which they commenced the proceeding referred to. (See main brief, p. 120.)

The Circuit Court of Appeals in the first Edison suit had before it the entire question as to the real invention or inventions that Edison had made in view of the prior art, either in camera or in picture film, and the court held that the art was so far advanced that no principle remained to be discovered, or essentially new form of machine to be invented; *that Edison was not the inventor of the film*, and was not as to the camera a pioneer in the large sense of the term, or in the more limited sense in which he would have been if he had also invented the film; that he was not the first to take photographs of an object in motion by means of a single-lens camera or from a single point of view; or to so take such pictures at a high rate of speed; or to so take them upon a sensitized surface having an intermittent feed, the photographs being taken during the period of rest.

And the court held specifically that the picture film covered by claim 5 of 589168 was not patentable to Edison, did not constitute patentable subject matter, was not novel in the sense of the patent laws.

As to positives not being covered, the court said of the entire patent No. 589168 (114 Fed., 929):

The patent in suit pertains merely to that branch of the art which consists of the production of suitable negatives.

And again the court regarded the picture film claim as (114 Fed., 925)

obviously an attempt by the patentee to obtain a monopoly of the product of the apparatus described in the patent.

The court held that the product, that is to say, the article of manufacture, must be judged by itself, by its own inherent characteristics, and that it must itself, as an article, be new in a patentable sense; that the picture film was not new unless in length, which was a matter of degree, and that the other characteristics of the product were new only in the sense of greater accuracy of detail, etc., and that a picture film having these characteristics was not new in the sense that its production involved invention over and above that involved in the production of the camera.

In dealing with the camera claims 1, 2, and 3, and the camera invention, the court intimated that Edison had probably made a real invention in the organization of the feeding mechanism of the camera, but held that the claims before it did not cover that invention.

In the matter of claim 5 and the picture film, however, the court gave no such intimation.

On the contrary, its discussion and impeachment of claim 5 went to the whole substance of the alleged picture-film invention.

The contrast is striking in this regard between the treatment by the court of the alleged camera

invention on the one hand, and of the alleged picture-film invention on the other hand.

And the emphatic repetition of the decision made by the same court five years later that Edison did not invent the film was accompanied by an upholding of the three reissued camera claims as good and valid over the art.

(6) THE CAMERA PATENT, REISSUE NO. 12037.

This is undoubtedly a valuable and important patent on a part of the camera. We conceded its validity and its value at the argument; but even if the patent be valuable and important, it does not entitle the owner thereof to monopolize or dominate the art by virtue of its ownership. The Circuit Court of Appeals, by Judge Lacombe, sustained the patent in 1907, at the same time referring with approval to their earlier decision in which they had held that the film is not patentable.

Accordingly, we have this question: May the owner of a patent on a part of the camera control the commerce in the product by virtue of his patent on the camera, although the court has held that the product itself is not patentable? The answer must be in the negative; otherwise the owner of the camera patent will be obtaining, through that ownership, a power over the product which the patent laws will not grant him in the form of a patent on the product. That is, he is refused a patent on the product, but seeks to obtain the same power by means of the ownership of a patent on

something else. It is obvious that if defendants' argument is sound it is not necessary to obtain a patent in order to dominate the commerce in the article for which the patent would otherwise be sought. It would only be necessary to obtain a patent on something in connection with which the article is used.

This reasoning shows the absurdity of attempting to justify the conditions and restrictions attached to the use of the patents in the case at bar. By means of these conditions incorporated in licenses defendants acquire a monopoly which the courts have refused in the form of a patent monopoly. Judge Wallace said the Edison Co. could not monopolize the product by a patent; he refused the patent. Therefore they would monopolize it by tying up its use to another patent.

XI.

The film patent does not cover the positive print. Phraseology employed in letters patent establishes this.

On the question whether or not the film reissue patent 12192 applies to positive prints, we respectfully direct the court's attention to the language of Judge Wallace and also to the language of the Letters Patent 12192, and ask that it be contrasted with the language used in the camera reissue patent 12037. It is evident from the opinion of the Court of Appeals of the Second Circuit, written by Judge Wallace, that the court was considering

whether or not the patent 589168 applied to negatives. Judge Wallace said (I, 155, fol. 4):

The patent in suit pertains merely to that branch of the art which consists of the *production of suitable negatives*.

And later on in the opinion he said (I, 162, fol 2):

He was not the first inventor of apparatus capable of *producing suitable negatives*.

A comparison of the language used in the film patent reissue 12192 with the language used in the camera patent reissue 12037 conclusively establishes that the film reissue is a claim only on the negative, and that it does not apply to the positive print. If 12192 in fact applies to positive prints, as asserted by counsel for the defendants, why was the clause referring to positive prints expressly omitted from the Letters Patent 12192 but inserted in 12037. (It is to be remembered that these two patents are both reissues of No. 589168.) The fact is the words must have been omitted from 12192 for the express purpose of limiting the claim to the negative.

Letters Patent 12192, after describing the manner in which the film is run through the camera and how photographs are taken therein, states (line 119 of letters patent, defendants' Exhibit 187, Vol. VI, p. 3326):

When the movement of the object being photographed has ceased or the desired number of photographs has been obtained, the apparatus is stopped. The film is suit-

ably treated for developing and fixing the pictures, when IT is ready for use in an exhibiting apparatus.

On the other hand, the language in 12037 reads as follows (line 118, defendants' Exhibit 185, p. 3326) :

When the movement of the object being photographed has ceased or the desired number of photographs has been obtained, the apparatus is stopped. The film is suitably treated for developing and fixing the pictures, *when positive prints therefrom can be used* in an exhibiting apparatus.

The elimination of the clause "when positive prints therefrom" from patent 12192 shows that the drawer of specifications 12192 had in mind the projection of pictures of the negative, whereas in 12037 he had in mind the projection of the positive.

Therefore, it is evident that 12192 applies to negatives alone.

At no place in 12192 is there any reference to the positive print. The description is only of the negative film. There was a demonstration during the argument of the exhibition of the negative, and it was shown to the court that an exhibition may be given by the use of negative films.

Accordingly, we maintain that the proper construction of Letters Patent 12192 is that it applies only to the negative and has no reference to the positive. If this be the correct construction of the

letters patent, it becomes manifest that the Bath Tub decision is on all fours with this case. In the production of the positive the negative film is used, just as in the manufacture of enamel ware the so-called Arrott dredger is used.

An examination of the patent 589168 and re-issue 12038 leads to the same conclusion.

Letters Patent 589168 and reissued letters patent 12038 do not appear in the record as exhibits. The first of these two patents was, as has been elsewhere stated, the original patent upon which Judge Wallace's opinion was rendered; the six claims under that patent were subsequently re-issued, four camera claims as 12037 and the two claims on the film as 12192. The latter number, however, 12192, was the second reissue of the film claims, the first reissue being 12038, which was contemporaneous with 12037. It is a significant fact that the clause which we have quoted above from 12037 was inserted in 12038 and stricken out of the reissue 12192.

The wording of the clause in 589168 was as follows:

When the movement of the object being photographed has ceased or the desired number of photographs has been obtained, the apparatus is stopped. The film is suitably treated for developing and fixing the pictures, when it is ready for use in an exhibiting apparatus.

This is the same phraseology as was used in 12192.

The latter sentence of the quotation just given, however, was changed in 12038 so as to read as follows:

The film is treated for developing and fixing the pictures *when positive prints therefrom* (Fig. VI) can be used in an exhibiting apparatus.

No. 12038 was issued July 15, 1902. It was subsequently abandoned by the Edison Company and 12192 issued on January 12, 1904.

In 12192 the claimant returned to the language of 589168 by striking out from 12038 the clause "when positive prints therefrom (Fig. VI)."

The above examination of the phraseology employed in the several letters patent demonstrates beyond question that 12192 describes the negative film alone and can not by any possibility be construed as constituting a claim on the positive print which is made from the negative.

XII.

Cases dealing with relation of patent laws and the Sherman Act not discussed in our main brief although there cited, pages 21-22.

(1) Judge Hollister's opinion in the *Cash Register* case—*United States v. Patterson*, 205 Fed., 292. This opinion was rendered on a decision on the admissibility of certain evidence. The ques-

tions had been argued at great length before District Judge Hollister by distinguished counsel. (See p. 293.) The question was whether or not evidence might be introduced by the defendants of the character and scope of the patents owned by the National Cash Register Company and whether or not the various competitors named in the indictment were infringers of those patents. The evidence was excluded.

(Page 294:) The claim is made by counsel for the defendants that there can be no such thing as a free flow of commerce or trade in articles made in infringement of a patent, and this is on the ground that a patentee has a monopoly by virtue of the laws of the United States enacted in pursuance of constitutional authority. They say that a patentee, having a lawful monopoly by the operation of the patent laws, can not be charged with monopolizing under the Sherman Antitrust Act.

In the course of a well-considered opinion, Judge Hollister said:

(295:) Counsel have cited no case—if there had been one, they would have found it—and the assertion, usually of doubtful wisdom, may in this connection be safely made that no decision will be found sanctioning acts of violence by a patentee in the protection of his patent right, acts of violence against the claimed infringing article or the business of in-

fringers. And it may also be safely said that, at least until the patentee has established the validity of his patent and the fact of infringement, he will not be permitted by a court of equity, and at the suit of even one who may eventually be held to be an infringer, to engage in acts of unfair competition.

(298:.) Briefly, the Sherman Antitrust Act makes it unlawful to conspire in restraint of interstate trade, or to monopolize or attempt to monopolize the same. The Supreme Court have described a conspiracy as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not unlawful in itself, by criminal or unlawful means. The act does not expressly except articles infringing a patent, nor does it refer to such articles entering into interstate commerce and in actual competition with a patented article.

It is lawful for a patentee to exclude such competition. The patent laws expressly provide that he may do so and how he shall do it, and even if the combination or agreement complained of were to accomplish even a lawful thing, namely, the monopoly a patentee may have, still, under the definition of a conspiracy, that may not be attained by unlawful means; and if those unlawful means are in fact in restraint of competitive business actually a part of interstate commerce, then the patentee has

undertaken to accomplish in a wrong way what he could do in a lawful way.

(299:) Consequently all courts having jurisdiction, State or Federal, without regard to the patent laws, may enjoin acts by a patentee in restraint of the trade of the plaintiff, until the defendant, the patentee, establishes his right to exclude the plaintiff from trade which, until infringement is established, is recognized as being carried on of common right, no matter how much he may compete and no matter how much the article or the business complained of may compete in the meantime with the patented article or the business through which it is put upon the market. A patentee may properly warn the offending competing manufacturer, and may call attention to his patent and his claim of infringement; but when he threatens suit and does not bring it, or engages in acts of unfair competition, a court of equity will say to him: "Hold your hand: If you really have a patent, if the competitive concerns of which you complain are really infringing your patent, take the method the patent law has given you of establishing your monopoly by excluding your competitors, by enjoining them or seeking damages in the courts of the United States; otherwise, you interfere with your competitors' business at your peril."

* * * *

Until the patentee brings the suits and makes the field his own, there is no way

under the patent laws, and the nature of the right given him, by which he can put his competitor engaged in interstate commerce out of business. And if two or more persons, under whatever name or form or method, however subtly devised, agree to accomplish by unlawful means that which they could accomplish in the way provided by law, then such conduct, if directed against the business of the competitors and necessarily directly affecting it, is a conspiracy against trade, and if that trade is interstate trade, it is an offense under the Sherman antitrust act.

(301:) The power of Congress to regulate interstate commerce is complete and supreme. It is lawful to go into the cash-register business. Anyone may, as a matter of right, go into the cash-register business and make his products the subject of interstate commerce, and may continue to do so until he is restrained by a court of equity upon the fact being established that he is an infringer; and even after the establishment of such fact he is amenable only to the court issuing the injunction or may be subject to the payment of damages or profits or both, but he is not figuratively an outlaw to be brought in dead or alive and his business confiscated by a patentee who is unwilling or afraid to pursue him by lawful methods and who would destroy his business, interstate though it is, by unlawful means.

(2) *Coaster Brake* case: *United States v. New Departure Mfg. Co.*, 204 Fed., 107; decision by District Judge Hazel.

This was a combination of manufacturers of coaster brakes who had licenses with one of the defendants quite similar in character to the licenses here under consideration. The decision was on demurrer to the indictment. The court, after citing the *Bath Tub* case, the *Bement* case, *National Harrow v. Hench*, 83 Fed., 36 (see our main brief p. 28) and *Blount Mfg. Co. v. Yale & Tourne*, 166 Fed., 557, overruled the indictment, saying, page 114:

(114:) So here, as claimed by the Government, the license agreements were resorted to as a subterfuge to aid in stifling competition in trade and commerce, and to enhance the value of the respective businesses of the defendant, and to create a monopoly in their productions.

The court, referring to the *Bement* case, said (p. 113):

* * * the intimation in the opinion is clear that the monopoly secured to the patentee by the issuance of a patent can not be designedly used to form a combination or conspiracy between manufacturers and dealers to accomplish a restraint of trade such as the antitrust act prohibits.

The court also quoted from the Circuit Court of Appeals for the Third Circuit in the *National Harrow* case, where it was said:

The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact.

(3) *Robert H. Ingersoll & Bro. v. McColl*, 204 Fed., 147: District Judge Willard, of Minnesota, held that where a license restriction was imposed by the owner of a patent not for purposes of protecting the patent or for securing its benefits, but for the purpose of evading the antitrust act, it was void. The restriction under consideration in the case was a price restriction. The opinion considers numerous cases. After citing the *Bobbs-Merrill*, *Dr. Miles Medical*, *Bement*, *Dick* and *Bath Tub Trust* cases, the court said:

From these authorities the rule to be deduced is this: If the license restriction is imposed, not for the purpose of protecting the patent or for securing its benefits, but for the purpose of evading the provisions of the antitrust act, then it is void, because such restriction is not "a reasonable condition imposed upon the licensee of a patent by the owner thereof," nor is it "a condition suitable to protect the use of a patent and secure its benefits."

(153:) The right of a patentee to do what he may please to do with the patented article is not unrestricted. It is limited in

the manner indicated by the cases hereinbefore cited. He can not impose upon a purchaser a condition which is unreasonable. He can not impose an unreasonable condition, for the purpose of enabling him to violate the antitrust act. It appears from the evidence in this case that the license restriction so imposed on the sale of the Yankee watch is not for the purpose of securing the benefits of the patented improvements therein, but in order that the plaintiffs may protect the trade-mark or trade name under which they sell the watch. Such a condition was not imposed "to protect the use of the patent or the monopoly which the law conferred upon it." It is an unreasonable one, is beyond the power of the plaintiffs to impose upon the defendant, and is void as to him.

(4) *Blount Mfg. Co. v. Yale & Towne*, 166 Fed., 555: Decision by District Judge Brown, of Massachusetts, who said, page 562:

Combinations between owners of independent patents, whereby, as part of a plan to monopolize the commercial field, competition is eliminated, are within the Sherman Act, *for the reason that the restraint of trade or monopoly arises from combination*, and not from the exercise of rights granted by letters patent. (Italics ours.)

(5) *Waltham Watch Co. v. Keene*, 202 Fed., 225: This is a long and well-considered opinion by District Judge Ray, of New York State, on the

subject of the patentee attempting to control resale prices. We particularly direct the attention of the court to that part of the opinion beginning at the bottom of page 238 in which Judge Ray discusses the law relating to combinations of manufacturers operating under the protection of a patent.

(6) Thornton's work, entitled "A" Treatise on the Sherman Antitrust Act," printed by William H. Anderson & Co., Cincinnati, in 1913:

Chapter XV of this work, pages 615 to 652, brings together many cases relating to the Sherman Act and the patent laws. It will be found useful for purposes of reference.

In *United States v. Great Lakes Towing Co.*, 208 Fed., 733, Circuit Judges Warrington, Knappen, and Dennison, of the Sixth Circuit, held that the Great Lakes Towing Company, a combination formed for the express purpose and with the express intent of eliminating the naturally existing competition in interstate commerce and of monopolizing and restraining such commerce by the employment of unusual and abnormal methods of business, was in violation of the antitrust act. The court said, page 741, that it may—

be regarded as well settled that a combination formed for the express purpose and with the express intent of eliminating natural and existing competition in interstate commerce and of monopolizing and restraining such interstate commerce by the

employment of unusual and abnormal methods of business, constitutes undue restraint or suppression, and so offends against the antitrust act. (*Standard Oil Co.*, supra; *American Tobacco Co.*, supra; *Reading case*, supra.)

And at page 744:

The fact that the towing and wrecking service has been improved under the towing company's administration can not legalize the combination if otherwise unlawful. Not only do good motives furnish no defense to a violation of the antitrust act (*Standard Sanitary Mfg. Co. v. United States*, 226 U. S., 20; 33 Sup. Ct., 9; 57 L. Ed., 107), but we have no right to assume that the unsatisfactory conditions existing in 1899 could not have been eliminated by lawful and normal methods.

Has the towing company acquired this domination of the towing and wrecking service by normal methods alone; or, as otherwise stated, has it unduly restrained or suppressed competition? We think it clear that the towing company's domination does not result from normal methods alone. Whatever may be the views of individual economists, under the Federal statutory policy normal and healthy competition is the law of trade, and such evils as may result from such competition must be considered less than those liable to follow a complete unification of interests and the power such unification gives.

XIII.

Final observations.

A thousand factors determine the success of a motion picture, for the art has advanced gradually owing to numerous inventions and discoveries, some patented and some not patented. Yet, any one reading defendants' brief or the answer of defendants and knowing nothing about the motion-picture business or about photography, would assume that the entire art had been founded upon the patents controlled by the Patents Company. The analysis we have given above in respect to each of these patents has shown just what is the value of each. In our opinion the only patent which has any material value is the Edison camera patent, but that invention was valueless until some one could invent a film which could be used. Successful commercial use of the Edison camera patent is dependent not only upon the film but upon all the other processes and improvements made in such processes in the photographic art. Assuming, *arguendo*, the arguments of defendants that the patents are complementary and that they are valuable, nevertheless we maintain with confidence that the Sherman law prohibits restraints of trade and monopoly accomplished by means such as were employed in this case.

Mr. Church says in his brief (p. 1) that the patents "properly cover and lawfully monopolize the industry in which the defendants are engaged, and

in it the public have no right to enter save as permitted by their owners," and that, therefore, these patents constitute ample protection and afford ample immunity from prosecution under the Sherman law.

So also Judge Moon in his brief, page 68, says:

Let us keep constantly in mind that the field that he was exploiting was his own field, exclusively. No part of it belonged to the public. In no part of it did competition exist or was competition possible because the owner of this patent created the field. The public had no right in that field whatever and the rental exchange owners and the exhibitors had just such rights as were given them by their license contracts; **no more.**

We take issue on these statements of the facts and also on the stated proposition of law.

The patents involved here do not properly cover and lawfully monopolize the industry. The motion-picture industry rests upon all the wonderful discoveries and advances made in the photographic art in the last three score of years. Many inventions made in that period have become the property of the public by reason of the expiration of the patents. If the owners of a few patents in any line of industry may at any time lawfully combine and incorporate restrictions and conditions such as were incorporated in the license agreements in this case, the Sherman Act means

nothing. A few patentees by combining their inventions may deprive other inventors of the use of their inventions by excluding them from the industry. Similarly, they may deprive the public of the rights acquired in inventions where the patents have expired.

This demonstrates the soundness of the rule laid down by the Supreme Court that the Sherman Act prohibits every combination no matter what form it may take. The question in every case is whether or not the combination the lawfulness of which is under consideration has brought about the evils and injury to the public from which the statute is designed to protect the people. We are dealing here with a combination of conditions, with interlocking restrictions imposed by a powerful group of manufacturers, and not with legal and reasonable conditions imposed independently and in the normal and usual course of business by the owner of one patent.

The agreements are being enforced to-day. On this point we refer to our main brief, pages 240 et seq. When the petition in this suit was filed, the license agreements of June 6, 1912, were in force and had superseded the earlier agreements of December, 1908. The change effected by the agreements of June 6, 1912, did not materially alter the earlier agreements. These modifications are described in the answer of the Patents Company, fols. 348-355. (See also our main brief, p. 241.)

The agreements of June 20, 1913, did not super-

sede the earlier agreements until all the testimony in this suit on behalf of the Government had been taken. The modifications effected by the agreements of 1913 are stated in defendants' principal brief, pages 316 et seq.

The defendants vigorously assert the lawfulness of every condition and restriction contained in the earlier license agreements, and unless these are pronounced unlawful by this court defendants will undoubtedly replace in the license agreements such conditions as they may have temporarily abandoned in their later agreements. In view of the fact that all the conditions as described in the petition were in force and being observed by the defendants when the petition in this case was filed, they should be declared unlawful. (See authorities cited in our main brief, pp. 242-245.)

Mr. Moon's brief contains a curious inaccuracy. He states (p. 34) that Mr. Thomas A. Edison "stands before the bar of this court as a defendant." In this statement he is mistaken. There is no word of evidence in the record connecting Mr. Edison with any of the acts of which the Government complains. It does not appear that he is an officer of any of the defendant companies, nor that he attended any of the meetings at which the unlawful acts were planned. On the other hand, the Government put in evidence Mr. Edison's testimony in an earlier case that he was not the inventor of the film. This evidence was intro-

duced by the counsel for the Government for the express purpose of showing that Mr. Edison does not make the extravagant claims for which the counsel for the defendants in this case so stoutly contend. Mr. Edison stated:

I did not regard the film as a part of my invention; I looked to the people who made it for that. (VI, 3309, fol. 2.)

In spite of this statement by Mr. Edison, defendants say in their answer: "The films that Edison sold embodied his inventions only." (Ans. Pat. Co., fol. 91. See also fols. 101 to 105.)

In the answer page 11, fol. 22, they say: "The film contains one essential invention, Edison's only." (See examination of Mr. Marvin on this point, I, 228-232.)

The term "Edison film" is used on the diagrams (defendants' Exhibits Nos. 180 and 181, VI, 3266) in a misleading manner. The term is applied to the film as it appears in the diagrams although nothing is done to the film after it is bought from Eastman except to place it in the camera. (See cross-examination of Mr. Marvin in respect to the use of this term, VI, 3278, et seq.)

The Vitagraph Company copyrights every picture. (Defendants' main brief, p. 381; Smith, III, 1784.) A copyright does not protect the owner from violation of the Sherman Act. *Straus v. American Publishers Assn.*, 231 U. S., 222 (see

our main brief, p. 287). How in reason can it be said that the copyrighted article is also a patented article?

As to the decree.

We respectfully submit that the decree should grant relief along the lines prayed in the petition. If the full relief prayed for in the petition be granted, this will not prevent the lawful owners of the patents from issuing normal and legal licenses to use the patents. The decree in the so-called *Bathtub Trust* case was similar to that prayed for here in respect to the license agreements. There was inserted in that decree a saving provision respecting the patents which can be incorporated in the decree in this case. That clause of the decree read as follows:

That this decree shall not be construed to prevent whoever may be the owner or owners of the Arrott patent and other dredger patents relating to the manufacture of sanitary enameled ironware from granting lawful licenses to any of the defendants or others to use such patents or to prevent the defendants or others from taking lawful licenses to use any of such patents.

The *Bathtub Trust* case also decreed:

The defendants in the manner set forth in the petition have entered into and are engaged in a combination in restraint of trade and commerce among the several States in sanitary enameled ironware and

are attempting to monopolize said trade and commerce in said ware. * * *

That the so-called manufacturers' license agreements and the jobbers' license agreements and the price lists made part of said agreements, all described in the petition herein, have been and are the means adopted and used by the defendants in order to carry into effect the objects and purposes of said unlawful combination in restraint of said interstate trade and commerce in violation of said act of Congress, and that the said agreements and price lists are therefore hereby declared illegal and the defendants and all and each of them and their officers, agents, servants, and employees are enjoined and prohibited from doing anything in furtherance of said manufacturers' license agreements and jobbers' license agreements, and from enforcing in any manner said agreements or any of the terms thereof, and from adopting or enforcing said price lists in interstate commerce in sanitary enameled ironware.

That the defendants, their officers, agents, servants, and employees, are enjoined and prohibited from continuing their attempt to monopolize interstate commerce in said ware by means of the unlawful combination hereinbefore described, and more particularly by means of said manufacturers' license agreements and jobbers' license agreements, and said price lists, or by any other means similar thereto.

That the said defendants, their officers, directors, agents, servants, and employees, are enjoined and prohibited from resuming, engaging in, continuing, or carrying into further effect the combination adjudged illegal hereby, and from engaging in or entering into any like combination or attempt to monopolize the effect of which will be to restrain commerce in sanitary enameled ironware among the several States of the United States, or in the Territories of the United States, by making any express or implied agreement or arrangement together, or one with another, like that adjudged illegal herein, relative to the control or management of the business of the said defendants in sanitary enameled ironware the effect of which will be to prevent each and any of them from carrying on interstate trade and commerce in sanitary enameled ironware in competition with the others.

In our main brief, pages 302-320, we discuss the form of decree necessary in the cases of the Patents Co. and General Film Co.

Respectfully submitted.

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